

February 4, 2019

VIA ELECTRONIC FILING


Ms. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

**Re: Tarlton and Son, Inc. and Robert Munoz, an individual
Cases 32-CA-119054 and 32-CA-126896**

Dear Ms. Rothschild:

The purpose of this letter is to call to the Board's attention its decision in *DirectSat USA, LLC*, 366 NLRB No. 40 (2018), Motion for Reconsideration denied, 366 NLRB No. 141 (2018), which the Board, through its attorney, has reaffirmed in the Brief which it filed in the United States Court of Appeals for the District of Columbia Circuit, Case Nos. 18-1092, 18-1156 and 18-1228, at pages 26-27 of that Brief. A copy of the cover page and the referenced pages is attached hereto. This relates to pages 1-4 and 8-10 of the Charging Party's additional position statement.

Sincerely,


David A. Rosenfeld

DAR:kk
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cc: See Proof of Service attached

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Nos. 18-1092, 18-1156 & 18-1228

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DIRECTSAT USA, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

DIRECTV, LLC

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

**ON PETITIONS FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF TWO ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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Furthermore, DirectSat does not claim that its due-process rights were violated by the Board's finding of a violation under a legal theory not raised by either the General Counsel or the judge, *i.e.*, that the New Product Lines proposal rendered the entire HSP relevant by integrating it into the parties' collective-bargaining agreement. To the extent that DirectSat would do so in its reply brief, that argument is now waived. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (issues not raised in opening brief are waived). Moreover, the Court would lack jurisdiction to hear that argument because DirectSat did not challenge the Board's ruling in a motion for reconsideration.¹⁸

In any event, the Board did not violate DirectSat's due-process rights. As the Board explained (JA258), and as recognized by this Court, the Board can find a violation for a different reason and under a different legal theory than articulated by the judge. *See Local 58, Int'l Bhd. of Elec. Workers (IBEW), AFL-CIO*, 365 NLRB No. 30, 2017 WL 680502, at *5 n.17 (Feb. 10, 2017) (citing cases); *accord*, *e.g.*, *Davis Supermkts., Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993).

Ultimately, there is no prejudice to DirectSat inasmuch as the Union had asserted

¹⁸ As discussed at pp. 23-24, above, Section 10(e) precludes appellate courts from considering arguments that were not raised before the Board in the first instance. That bar also applies when the Board modifies a judge's recommended order or decides a particular issue in the first instance. *See Woelke & Romero*, 456 U.S. at 665-66 (failure to seek reconsideration of an issue the Board raised *sua sponte* prevents its consideration by courts); *accord Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216-17 (D.C. Cir. 2015).

from the start that it was requesting the full HSP because it was referenced in DirectSat's own proposal; that basis for the request remained in the case and the supporting evidence was presented at trial. The Board's finding in that regard cannot have been a surprise. *Davis Supermks.*, 2 F.3d at 1169 ("When an employer is not prejudiced by the Board's reliance on a theory not specifically addressed in the complaint or at the hearing, the employer's due process rights are not violated").

II. THE BOARD ACTED WITHIN ITS DISCRETION IN DENYING DIRECTV'S MOTION TO INTERVENE AND DISMISSING ITS OTHER MOTIONS AS MOOT

A. Relevant Findings of Fact and Procedural History

Two weeks after the Board issued its Order requiring DirectSat to furnish the full, unredacted HSP to the Union, DirecTV filed a motion to intervene, reopen the record, and for the Board to reconsider its decision, arguing that it should be given the opportunity to defend its interest in maintaining the HSP's confidentiality. (JA297.) The Board denied DirecTV's motion to intervene and denied the remaining requests as moot. (JA299.)

Attached to DirecTV's motion and reply in support were two declarations by John Sellers, DirecTV's assistant vice president. Sellers represented that the following notice appears on each page of the HSP:

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On February 4, 2019, I served the following documents in the manner described below:

CORRESPONDENCE TO EXECUTIVE SECRETARY RE *DIRECTSAT USA, LLC*

- ☒ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 4, 2019, at Alameda, California.

/s/ Karen Kempler
Karen Kempler